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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/024,199	12/21/2001	Claudio De Simone	2818-72	4379

7590 10/23/2003

NIXON & VANDERHYE P.C.
8th Floor
1100 North Glebe Rd.
Arlington, VA 22201-4714

EXAMINER

WARE, DEBORAH K

ART UNIT PAPER NUMBER

1651

DATE MAILED: 10/23/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action

Application No.

10/024,199

Applicant(s)

DE SIMONE, CLAUDIO

Examiner

Deborah K. Ware

Art Unit

1651

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 25 September 2003 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

PERIOD FOR REPLY [check either a) or b)]

- a) ☒ The period for reply expires 4 months from the mailing date of the final rejection.
- b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection. ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☐ A Notice of Appeal was filed on _____. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☒ The proposed amendment(s) will not be entered because:
- (a) ☒ they raise new issues that would require further consideration and/or search (see NOTE below);
- (b) ☒ they raise the issue of new matter (see Note below);
- (c) ☒ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d) ☐ they present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: see Attachment A.

3. ☐ Applicant's reply has overcome the following rejection(s): _____.
4. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
5. ☒ The a) ☐ affidavit, b) ☐ exhibit, or c) ☒ request for reconsideration has been considered but does NOT place the application in condition for allowance because: see Attachment A.
6. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
7. ☒ For purposes of Appeal, the proposed amendment(s) a) ☒ will not be entered or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: None.

Claim(s) objected to: None.

Claim(s) rejected: 1-11 and 15-22.

Claim(s) withdrawn from consideration: _____.

8. ☐ The proposed drawing correction filed on _____ is a) ☐ approved or b) ☐ disapproved by the Examiner.
9. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____.
10. ☐ Other: _____

ATTACHMENT A

Claims 1-11 and 15-22 remain pending in the instant case. The after final amendment filed September 25, 2003 has been received and scanned into IFW, however, the newly submitted claims create new issues for search and would require further consideration after final. The proposed new claims will not be entered. It appears Applicants are now after final of the desire to change inventions which puts a burden upon the examiner for further search and consideration of new issues after final. Applicant's arguments are directed toward non-entered subject matter wherein before final the claimed invention was not directed toward the concept of potentiating the activity of peroxide-producing lactic acid bacteria. With respect to the argument that no new issues under 35 USC 112, second paragraph are presented by the newly added proposed subject matter is not deemed persuasive since at least one issue of antecedent basis is noted in proposed claim 23 at line 1, wherein "the activity" appears to lack antecedent basis. Also the alternative language "or mixing with" at line 2 of claim 23 may present a new matter issue under 35 USC 112, first paragraph, as the examiner did not find support for this language in the original disclosure. Furthermore, by changing to a new statutory class of invention, of which is a newly proposed method of potentiating the activity of hydrogen peroxide-producing lactic acid bacteria this also changes the search and further, contemplation of new issues of art for the newly proposed claimed invention. Therefore, for these reasons the after final amendment can not be entered. With respect to Applicant's arguments of which appear to be directed to non-entered subject matter; but nonetheless, appear to address the

combination of the applied art of record with respect to combining arginine-utilizing lactic acid bacteria with peroxide-producing bacteria, Applicant has not shown unexpected successful results and the art of record is clear upon the combination of several different types of lactic acid bacteria for pharmaceutical use as claimed of record. With respect to the cited prior art combination, the primary reference does not provide any negative teaching with respect to combination of lactic acid bacteria, however, the reference is silent with respect to *L. brevis* as an arginine-utilizing bacteria of which Ehret remedies and thus, the selection of *L. brevis* for use in a combination of lactic acid bacteria as disclosed by the primary reference is an obvious modification of the cited prior art. No unexpected successful result by Applicant has been shown to have been obtained and to combine these lactic acid bacteria as disclosed by the primary reference and Ehret is clearly obvious and within the skill of an ordinary artisan. Also Applicant has not established on the record that *L. brevis* as disclosed by the primary reference do not use arginine and Applicant has conceded that Ehret teaches *L. brevis* can use arginine. Thus, the combination of lactic acid bacteria is obvious over the cited prior art. The motivation to select for *L. brevis* is clear from each of the cited prior art references because each teach selection of *L. brevis*. *L. brevis* is disclosed by Ehret to be arginine-utilizing lactic acid bacteria. Therefore, for reasons of record the claims remain prima facie obvious over the cited prior art.


Any inquiry concerning this communication or earlier communications from the examiner should be directed to Deborah K. Ware whose telephone number is 308-4245. The examiner can normally be reached on 9:30-6:00.


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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mike Wityshyn can be reached on 308-4743. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 308-0196.


Deborah K. Ware
October 21, 2003


DAVID M. NAFF
PRIMARY EXAMINER
ART UNIT 1651